IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. JOSE LUIS BAUTISTA RAMIREZ

Direct Appeal from the Criminal Court for Hamblen County
No. 05-CR-302 James Edward Beckner, Judge

No. E2006-00003-CCA-R3-CD - Filed December 4, 2006

The appellant, Jose Luis Bautista Ramirez, pled guilty in the Hamblen County Criminal Court to the facilitation of the sale or delivery of .5 grams or more of cocaine, a Schedule II controlled substance. The appellant received a sentence of three years incarceration in the Tennessee Department of Correction. As part of his plea agreement, the appellant reserved the following certified question of law: whether there was "a lack of unequivocal, specific, intentionally given consent for the search of the [appellant's] residence." Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and J.C. MCLIN, JJ., joined.

William L. Wheatley, Sevierville, Tennessee, for the appellant, Jose Luis Bautista Ramirez.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Kim Lane, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The appellant was originally indicted by a Hamblen County Grand Jury for the possession of 15.6 grams of cocaine with the intent to sell or deliver, simple possession of 5.6 grams of marijuana, and possession of drug paraphernalia. After the indictments were returned, the appellant filed a motion to suppress drug evidence found in his home by police.

At the suppression hearing, Officer Chad Mullins testified that on April 4, 2005, he was dispatched to 1322 Mae Collins Road as the result of a call to 911 by Eric Waites and Dustin Woodard. Officer Mullins rode around Sawyers Road, which is adjacent to Mae Collins Road, and encountered Waites and Woodard. They told Officer Mullins that they had been passing by 1322 Mae Collins Road when a Hispanic male came out of a mobile home at that location, turned loose pit bull dogs on Waites and Woodard, and started shooting an automatic rifle. Waites and Woodard described the location more specifically, noting that a new four-door Dodge pick-up truck with flames painted on the back windows was parked beside the mobile home.

Officer Mullins, with Officers Sizemore and Morris, went to 1322 Mae Collins Road to investigate. As the officers approached the residence, they saw a truck matching the description given by Waites and Woodard. A pit bull dog was tied up in the front yard, and another pit bull dog was in the back yard. Officer Mullins knocked on the door of the residence, and a young Hispanic male, Oscar Cippriano, answered the door. Officer Mullins asked Cippriano if anyone at the residence had been shooting a gun, and Cippriano said no. Officer Mullins asked if there were any guns in the residence, and Cippriano replied in the negative. Next, Officer Mullins requested permission to search the residence for weapons because there had been a report of automatic gunfire coming from the residence. Cippriano let the officers in to search. Prior to searching the residence, the officers did not ask Cippriano if he lived there.

As they entered the residence to search, the officers noticed the appellant sleeping on the living room floor. Cippriano's father, Manuel Jose Bautista Lopez, was also in the residence with the appellant and Cippriano. While Officer Mullins stayed in the living room with the three men, Officer Sizemore went into a bedroom of the residence and found an AK-47 automatic weapon with a sixty-round banana clip. Several other weapons were leaning against the bedroom wall.

At that point, the officers decided to handcuff the three men for safety. The officers woke the appellant, who was intoxicated and belligerent about being handcuffed. After the appellant was handcuffed, he asked the officers for permission to put on his blue jeans. Officer Morris searched the jeans prior to giving them to the appellant and discovered a ball of cocaine weighing 14.4 grams in the pocket. Thereafter, the officers continued to search the residence, ultimately finding an additional 1.2 grams of cocaine and 5.1 grams of marijuana that was being packaged on the kitchen table.

Officer Morris noticed a locked barn behind the residence. He asked the three men for a key to the barn and permission to search the barn. Officer Morris said, "[T]hat's when they stopped my consent." The appellant "told me, no, he wouldn't give me a key." Officer Morris said that the appellant "spoke fluent English, and he's the one that basically that I was dealing with."

Oscar Bautista Cippriano testified through an interpreter that he was a nineteen-year-old from Mexico and that he had a sixth-grade education. Cippriano stated that the appellant was his cousin. He said that on the day in question, he opened the door for the police. Cippriano said that he spoke very little English, and the police spoke no Spanish. When he opened the door, a policeman put his

foot in the doorway so Cippriano could not close the door. Cippriano said that "as he was speaking to me, he was coming into the door and I was stepping back." The police asked if anyone had fired a gun. Cippriano said no. Cippriano testified that at that point the police "just came in and went into the room."

Cippriano asserted that the police did not ask permission to enter. He let them in because he thought that, as police, they had the right to enter. He thought that if he did not let them in, "they would handcuff me and take me to jail." Cippriano maintained that a policeman asked if he lived there, and he explained that he had arrived two days earlier. After the police came in, they searched everything. They found guns in a bedroom Cippriano shared with his father.

Cippriano acknowledged that after he was taken to the police station he gave a statement through a translator. In his statement, Cippriano said that the appellant gave him $2,500 to come to the United States. The appellant picked him up in California and brought him to the appellant's residence in Tennessee. The appellant had several guns in the residence, including the AK-47. Cippriano acknowledged in this statement that the appellant had discharged the guns because he was drunk and had been having problems with his wife.

At the conclusion of the suppression hearing, the trial court ruled that the search of the appellant's pants exceeded the scope of the consent and that any evidence about the cocaine found in the appellant's pants was inadmissible. However, the court found that Cippriano had the authority to give the officers consent to search, and he voluntarily gave his consent. Thereafter, the appellant pled guilty to the facilitation of the sale or delivery of .5 grams or more of cocaine while reserving a certified question of law as to whether Cippriano voluntarily gave consent for the police to search the residence.

II. Analysis

A. Certified Question of Law

Initially, we note that on appeal the State contends that the appellant did not properly reserve his certified question of law because his judgment of conviction does not set forth the certified question nor does it incorporate by reference any document which sets forth the certified question. Before we address the merits of the appellant's issue, we must first determine if he has properly reserved his certified question for appellate review.

Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure provides that an appellant may appeal from any judgment of conviction occurring as a result of a guilty plea if the following requirements are met:

> (A) The judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, must contain

> a statement of the certified question of law reserved by defendant for appellate review;
>
> (B) The question of law must be stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
>
> (C) The judgment or document must reflect that the certified question was expressly reserved with the consent of the state and the trial judge; and
>
> (D) The judgment or document must reflect that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case.

Additionally, in State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988), our supreme court explicitly provided prerequisites to appellate consideration of a certified question of law under Rule 37(b)(2)(i). The court stated:

> *Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise*, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved.

Id. (emphasis added).

This court has repeatedly cautioned that because Preston and Rule 37 mandate that certain prerequisites be met in order to properly preserve a certified question, a failure to properly comply with the prerequisites may result in the dismissal of the appeal. See State v. Pendergrass, 937 S.W.2d 834, 838 (Tenn. 1996). In State v. Armstrong, 126 S.W.3d 908, 912 (Tenn. 2003), our supreme court again considered the Preston/Rule 37 requirements and concluded that substantial compliance with the dictates of Preston was not sufficient to properly certify a question of law. However, Armstrong provided that a trial court could take action prior to the judgment becoming final in order to comply with Preston. See Armstrong, 126 S.W.3d at 912.

In the instant case, neither the appellant's plea agreement nor his judgment of conviction provide that he entered a conditional guilty plea while reserving a certified question of law. Further, the judgment of conviction does not explicitly incorporate by reference any document which states his certified question of law. However, in an order that was entered on the same day as the judgment of conviction, the trial court outlined the appellant's certified question of law. The order explicitly

provides that "[t]he issues certified are those presented in the motion to suppress previously filed by the Defendant, specifically: a lack of unequivocal, specific, intentionally given consent for the search of the residence." There is no question that "[t]he better practice . . . would have been for the judgment form to reference the trial court's order certifying the question of law." State v. Paul Anthony Wright, No. W2001-02574-CCA-R3-CD, 2003 WL 1860526, at *6 (Tenn. Crim. App. at Jackson, Apr. 7, 2003). We take this opportunity to again caution parties to scrupulously follow the clearly delineated requirements of Preston and Rule 37 for ensuring the preservation of a certified question. Regardless, we conclude that the order in the instant case, which was filed contemporaneously with the judgment of conviction and contains the agreement of the parties, serves to properly certify the appellant's question of law.

B. Warrantless Search

The appellant's certified question concerns whether the trial court erred in finding that Cippriano voluntarily consented to a search of the residence. In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence." Odom, 928 S.W.2d at 23.

Both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution provide protection for citizens against "unreasonable searches and seizures." Generally, a warrantless search is considered presumptively unreasonable, thus violative of constitutional protections. See State v. Walker, 12 S.W.3d 460, 467 (Tenn. 2000). Our supreme court has noted that, "[i]t is, of course, well settled that one of the exceptions to the warrant requirement is a search conducted pursuant to consent." State v. Bartram, 925 S.W.2d 227, 230 (Tenn. 1996) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973), and State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993)). "The sufficiency of consent depends largely upon the facts and circumstances in a particular case." Jackson, 889 S.W.2d at 221. The prosecution bears the burden of proving that the consenting party freely and voluntarily gave consent. See State v. McMahan, 650 S.W.2d 383, 386 (Tenn. Crim. App. 1983). "'The existence of consent and whether it was voluntarily given are questions of fact.'" State v. Ashworth, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999) (quoting McMahan, 650 S.W.2d at 386).

In ruling that the 1.2 grams of cocaine found in the residence was admissible, the trial court noted that the police had a right to be at the residence because of the 911 call. We agree. On appeal, the appellant notes that the trial court also found that Cippriano "was an individual who could legally give consent to search as the officers had no reason to believe that he did not reside there." The

appellant does not question this finding. Generally, consent may be given "either by the individual whose property is searched or by a third party who possesses common authority over the premises." State v. Ellis, 89 S.W.3d 584, 592 (Tenn. Crim. App. 2000) (citations omitted). We agree with the trial court that the facts indicated that Cippriano had the authority to consent to the search.

In making its ruling, the trial court further noted that "[t]hen it becomes a question of who do you believe, because the officer says that he got permission from Mr. Cippriano to enter the trailer. Mr. Cippriano says that he just acquiesced and let him in, the officers were coming in, and he didn't try to stop him, and he thought he'd go to jail if he did." The trial court observed that Cippriano understands some English, though probably not a great deal. The court opined that if the consent to search the residence was the result of mere acquiescence, then the parties should have logically also acquiesced to the officers' request to search the barn. The court said:

> Because these three people are there together during this period of time that these things are happening. And the point I was making is if everybody thought that you couldn't stop the officers or you would go to jail, then they would have thought even more so if they refused to give the key to the barn . . . .
>
> I'm just saying that all of those circumstances appear to corroborate the credibility of the officer that he asked Mr. Cippriano for consent to go in before he went in and that Mr. Cippriano gave him consent. Mr. Cippriano had a right to give consent. The officers – I believe the consent was understandably given and it was not mere acquiescence; and it was to be a search for weapons . . . .

The appellant's main complaint appears to be the trial court's use of the appellant denying permission to search the barn as proof that Cippriano was aware that he had the right to refuse the officers' request to search. We agree that the appellant's knowledge of his rights does not impute that Cippriano had knowledge of his rights. However, from our review of the record, it is apparent that the trial court used the refusal to consent to the barn search as an example of why he found the officer to be a credible witness. There is nothing in the trial court's statements to indicate that the only reason he found the officer credible was the appellant's refusal to grant permission to search the barn. The trial court's comments indicate that it simply found the officer to be a more credible witness, a factual determination we will not overturn on appeal. See Odom, 928 S.W.2d at 23. Taking that finding into consideration, we note that the officer's testimony indicated that Cippriano understood the officer's questions regarding firing or possessing guns, and Cippriano made appropriate responses to both questions. Upon the officer's request to search, Cippriano agreed and let the officers in, again indicating that he understood what was happening. Therefore, we can find no error in the trial court's decision that Cippriano freely and voluntarily gave his consent to search.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE